

that an agency administers a nonremedial program intended to promote diversity, the factual predicate must show that greater diversity would foster some larger societal goal beyond diversity for diversity's sake. The level and precision of empirical evidence supporting that nexus may vary, depending on the nature and purpose of a nonremedial program. For a nonremedial program, the source, type, scope, authorship and timing of underlying findings should be assessed, just as for remedial programs.

DOJ Memo, p. 36.

If the Commission reaffirms the view that its EEO program rests upon a compelling duty to increase "diversity" of programming, the nexus between the Commission's EEO requirements and programming transmitted by broadcast media must be supported by facts available to the Commission or solicited through a rule making process. Such a factual predicate must substantiate the premise that broadcast programming is not currently diversified and that competitive market forces are insufficient to remedy the defect.

## **V. NARROW TAILORING**

Under the strict scrutiny required by *Adarand*, governmental classification systems based on race must not only advance a "compelling" governmental interest, but must be "narrowly tailored" to achieve that purpose. As set forth in the DOJ Memo, the factors that typically make up the "narrow tailoring" test are: (1) whether the government considered race-neutral alternatives before resorting to race-conscious action; (2) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; (3) whether race is a factor in determining eligibility for a program or just one factor in the decisionmaking process; (4) the

comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (5) the duration of the program and whether it is subject to periodic review; and (6) the degree and type of burden caused by the program. Each of these factors is briefly taken up below.

### *1. Race-Neutral Alternatives*

From the beginning, the Commission's EEO program has relied explicitly upon racial and ethnic categories. The Commission has not explored the possibility that effective, race-neutral alternatives to achieving program diversity may exist.

As the D.C. Circuit had occasion to remind the Commission in *Lamprecht v. FCC*, 958 F.2d 328, 398 (D.C. 1992), predictive judgments based upon the connection between ownership of an interest in a broadcast station and the programming carried by that station are fraught with hazards. Even under the "intermediate" level of scrutiny sanctioned by *Metro*, the *Lamprecht* court found that the government had failed to show that its policy of granting a comparative preference to female applicants was substantially related to achieving diversity on the airwaves. 958 F.2d at 398. The Commission now faces the daunting task of substantiating a connection not between the ownership of broadcast media and the programming broadcast, but between levels of minority or female employment and types of programming broadcast. Such a nexus must be based upon empirical analysis rather than on intuition, lest the Commission perpetuate the very stereotypes it is attempting to undermine. See *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Predictive judgments concerning group

behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence. *Lamprecht, supra*, 958 F.2d at 393.

Comments on alternatives to race-based methods of achieving program diversity are obviously required.

## *2. Scope of Program*

The FCC's EEO Program affects all broadcast licensees.<sup>8</sup> The EEO program is currently designed to achieve not a discrete, time-limited purpose, but an indeterminate, indefinite purpose of increasing "diversity" of programming.

If the Commission reaffirms diversity of programming as the basis of its EEO program, it must examine the question of whether less intrusive, more narrowly tailored means of addressing such diversification are available. If the Commission instead reverts to the rationale that an EEO program is needed to prevent discriminatory employment practices, it must demonstrate the "compelling need" for a program that would, as it has recognized,<sup>9</sup> duplicate other federal employment programs, such as that imposed by the EEOC.

Although the Commission has from time to time collected data that indicate "improvement in the EEO profile of the broadcast industry generally," *Notice of Inquiry*, para 15, it has not attempted to demonstrate that increased levels of minority and female employment are attributable

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<sup>8</sup> Licensees are excused from the duty of preparing a written EEO plan if they employ fewer than five full-time employees or serve areas with a minority population of less than 5 percent. Licensees are always required to have an EEO program with respect to women. See *EEO Guidelines*, 46 RR2d at 1693-1694.

<sup>9</sup> See *Report and Order*, 60 FCC2d at 230.

to its EEO requirements, rather than broad societal changes, nor has it noted evidence of "what might result if the racial classification were discontinued." DOJ Memo, p. 37. Comments on this question are warranted.

### 3. *Manner in which Race is Used*

Race and ethnic background are facial elements of the FCC's EEO program. The FCC requires broadcast licensees to collect detailed information about the race and gender of all job applicants who make up the referral pool, the applicant pool and the interview pool for both part-time and full-time positions, and, upon request, to provide this information to the Commission for at least the three-year period preceding the filing of the renewal application, and potentially for the entire license term. See *Notice of Inquiry; Memorandum Opinion and Order*, 4 FCC Rcd at 1716 (1989). Broadcasters are also required to document their efforts to contact minority-specific referral sources and to advertise job opportunities in minority specific publications.<sup>10</sup>

The Commission has not evaluated the effectiveness of these requirements. If the Commission's concern is that a broadcaster give notice of job opportunities to "all elements of its community," *Report and Order*, 60 FCC2d at 229, could this concern be addressed simply by requiring notice requirements in publications of general circulation such as those detailed in 47 C.F.R. § 73.3580?

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<sup>10</sup> The Commission has recently based a \$30,000 forfeiture on the proposition that its recruitment procedures and record keeping procedures are more important than minority hiring results. See *GAF Broadcasting Co., Inc.*, *supra*.

#### *4. Comparison of Numerical Target to Relevant Market*

Although the Commission has abandoned quantitative standards as a “safe harbor” for broadcasters seeking to prove that their EEO “efforts” are adequate, the Commission continues to use quantitative criteria in evaluating broadcast renewal applications and assessing forfeitures for violation of its EEO rules. See, e.g., *Holiday Broadcasting*, FCC 95-153 (April 27, 1995). Because the Commission’s EEO program is intended to serve a non-remedial, programming purpose rather than a remedial, employment purpose, it is questionable whether statistical evidence related solely to employment practices is meaningful.

If diversity broadcast programming is the goal, the success or failure of the Commission’s EEO program can be determined only by analyzing the nexus between employment practices and programming. The Commission should invite comments on the question of whether such a nexus exists.

#### *5. Duration and Periodic Review*

Any affirmative action program must be viewed as a temporary exception to “the norm of equal treatment of all racial and ethnic groups,” *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989). The DOJ Memo interprets this requirement to mean that “a racial or ethnic classification is more likely to pass the narrow tailoring test if it has a definite end-date, or is subject to meaningful periodic review that enables the government to ascertain the continued need for the measure.” DOJ Memo pp. 26-27.

After conducting an exhaustive study of the development of the communications industry, *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC2d 145 (1985), the Commission concluded that government regulation was no longer necessary "to ensure the availability of information and new points to the public." *Syracuse Peace Council*, 2 FCC Rcd. 5043, 5051 (1987), *affirmed on nonconstitutional grounds*, 867 F.2d 654 (D.C. Cir. 1989). Both past and prospective growth in the number and types of information outlets since 1969<sup>11</sup> negated the need for governmental intervention and ensured the existence of a multiplicity of voices in the marketplace. *Syracuse Peace Council*, 2 FCC Rcd at 5050-5052. The Commission should invite comment as to whether the explosion of information outlets has rendered the FCC's EEO program as unnecessary as the now abandoned Fairness Doctrine.

The FCC's current EEO program is indefinite in duration and not subject to periodic review. The Commission should invite comment on methods of objectively evaluating the success or failure of its policy and on periodically applying that evaluation method to its EEO program.

#### 6. Burden

The Commission has "moved with steadily increasing actions to strengthen our rules and policies in the area of nondiscrimination in the employment policies and practices of broadcast station licensees."

*Report and Order*, 60 FCC 2d at 229. It now subjects every aspect of a

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<sup>11</sup> The year of the Supreme Court's decision upholding the constitutionality of the Fairness Doctrine in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) and coincidentally the year in which the FCC proposed the creation of an EEO program.

broadcast licensee's "efforts" to recruit minority and women candidates to exacting scrutiny. The issue is not, however, whether nondiscrimination is a worthy goal -- the Commission has disclaimed such a "sweeping mandate," *Report and Order*, 60 FCC 2d at 229 -- but whether the heavy burden imposed on broadcasters results in any measurable gain in the "field of public service broadcasting." *Id.* at 230.

### *7. Pool of Beneficiaries*

The Commission has not attempted to determine whether its EEO program actually achieves the goal of assuring that "programming fairly reflects the tastes and viewpoints of minority groups." *Report and Order*, 60 FCC2d at 229. To the extent that the Commission intends specific minority groups to receive programming which reflects their unique "tastes and viewpoints," its goal is fraught with the dangers of stereotyping against which the *Lamprecht* court warns. See 958 F.2d at 392-395.

Comments are warranted on the question of assessing how either the general public or particular minority groups derive program-related benefits from the FCC's EEO program.

### **CONCLUSION**

For the past quarter century, the FCC has maintained an EEO program which rests on the predictive judgment that EEO requirements in addition to those imposed by other state and federal law are necessary to increase "diversity" of programming in the broadcast medium. That

hypothesis remains untested. The Commission has not defined the goal of "diversity" with any precision, nor established any criteria for determining when diversity is achieved -- either by an individual broadcaster or the broadcast industry as a whole.

Diversity can no longer serve as a talisman. The *Adarand* decision now requires the Commission to undertake a searching examination of its EEO program, to substantiate the presumed relationship between employment practices and programming, and to determine whether the EEO requirements are narrowly tailored to achieve a compelling goal.

Haley Bader & Potts therefore urges the Commission to initiate a rule making as expeditiously as possible.

Respectfully submitted,

**HALEY BADER & POTTS P.L.C.**

  
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John Crigler

HALEY BADER & POTTS P L.C.  
Suite 900  
4350 North Fairfax Drive  
Arlington, VA 22203-1633  
703/841-0606

August 18, 1995



## CERTIFICATE OF SERVICE

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered\*, to the following:

Chairman Reed E. Hundt \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 814  
Washington, D.C. 20554

Commissioner James H. Quello \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 802  
Washington, D.C. 20554

Commissioner Andrew C. Barrett \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 826  
Washington, D.C. 20554

Commissioner Susan Ness \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 832  
Washington, D.C. 20554


Commissioner Rachelle B. Chong \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 844  
Washington, D.C. 20554

Roy J. Stewart, Esq.  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 314  
Washington, D.C. 20554

Renee Licht. Esq. \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 314  
Washington, D.C. 20554

Mr. Larry D. Eads \*  
Federal Communications Commission  
Mass Media Bureau  
1919 M Street, Room 302  
Washington, D.C. 20554

Ms. Paulette Y. Laden \*  
Federal Communications Commission  
Mass Media Bureau  
2033 M Street, Room 7218  
Washington, D.C. 20554

  
Dinah L. Hood

August 18, 1995

**HALEY BADER & POTTS P.L.C.**  
**EEO QUESTIONNAIRE**

The FCC has invited comments on proposals for "streamlining" its EEO requirements. The purpose of this questionnaire is to collect information about the burdens now imposed and the amount of relief that would result from proposed modifications.

Haley Bader & Potts recognizes that the information regarding EEO efforts is sensitive in nature. Thus, any data submitted will be used only in the aggregate. Individual stations will not be identified without their express consent.

\* \* \* \* \*

**Current Administrative EEO Requirements**

- 1) Please identify your station by call sign and community of license.

Call Sign

Community of License

- 2) For each station, please state:

Number of full-time employees

Population served

Arbitron market rank

- 3) Please estimate the total number of hours spent each year on the following aspects of EEO compliance:

- |  |             |
|--|-------------|
| (a) advertising job openings in media;                                 | _____ hours |
| (b) determining race/gender of applicants;                             | _____ hours |
| (c) preparing the Annual Employment Form 395;                          | _____ hours |
| (d) recruitment efforts with educational institutions;                 | _____ hours |
| (e) contacts with minority organizations;                              | _____ hours |
| (f) documenting all recruitment efforts;                               | _____ hours |
| (g) other EEO efforts undertaken by the station;                       | _____ hours |
| (h) preparing the EEO Program Report (FCC Form 396) each renewal term. | _____ hours |

- Which current EEO requirement imposes the *greatest* burden?  
How could the time burden be reduced?

## Regulatory Streamlining Proposals

1. FCC Proposals: The Commission has invited comment on proposals to reduce reporting and recordkeeping requirements. These proposals would exempt certain “qualifying” licensees from documentation and reporting requirements, but not from recruitment and referral efforts. The first issue is which stations should “qualify” for relief.

- The FCC currently exempts stations with fewer than five full-time employees from reporting EEO efforts. Would you support raising this exemption to 10 or fewer full-time employees?

Yes ☐ No ☐ No Opinion ☐

- To a higher number? If so, what number? \_\_\_\_\_ full-time employees

- Do you support exempting stations from EEO reporting and recordkeeping requirements based on the station’s market size?

Yes ☐ No ☐ No Opinion ☐

- If so, should station market size be measured according to:

(a) population served  
(e.g. less than 150,000; 375,000)?

Yes ☐ No ☐ No Opinion ☐

(b) national market ranking (Arbitron or Nielsen)  
(e.g., top 200; top 100)?

Yes ☐ No ☐ No Opinion ☐

(c) Some other standard?

- Stations in markets with a minority labor force percentage of less than 5 percent are currently exempt from filing EEO reports. Should this exemption be increased?

Yes ☐ No ☐ No Opinion ☐

- If so, to what level?

### Methods of Administrative Relief

#### Approach #1 - Simplified Reporting

- Do you support a proposal to require qualifying stations to file only the first page of FCC Form 395-B (Annual Employment Report) and Form 396-A (Broadcast EEO Model Program Report), and the first two pages of Form 396 (Broadcast EEO Program Report)?

Yes ☐ No ☐ No Opinion ☐

- Would this proposal significantly reduce EEO efforts?

Yes ☐ No ☐ No Opinion ☐

- If so, by how much?

- Would you suggest any other proposal for decreasing the amount of administrative time spent in complying with EEO requirements?

- The FCC has expressed concern that elimination of recordkeeping requirements would make it hard for stations to demonstrate compliance with the Commission's EEO rules. Is this concern realistic or do you routinely keep all job application materials for some period of time? Please comment.

## Approach #2 - Recordkeeping Options

As an alternative to contacting recruitment sources likely to refer qualified minority and women applicants, the FCC has proposed to allow stations to comply with recruitment obligations by management-level, in-person participation in a minimum number of recruiting events each year (for example, four events such as job fairs or on-campus interviewing at local schools per year).

- Do you prefer the present system or the alternative?

Present System ☐ Alternative ☐ No Opinion ☐

- Would this "recruitment event" alternative reduce EEO efforts?

Yes ☐ No ☐ No Opinion ☐

- If so, by how much?

- Should a station that chose the "recruitment events" option be required to document the results of those events (e.g., by retaining all resumes and data regarding all interviewees)?

Yes ☐ No ☐ No Opinion ☐

- Would such a requirement substantially reduce the amount of time saved by using the "recruitment events" option in the first place?

Yes ☐ No ☐ No Opinion ☐

- Are there other ways of improving the efficiency of reduced recruitment recordkeeping efforts?

## Employment Benchmark

The FCC currently has no minority employment benchmark, although it routinely investigates renewal applicants whose employment levels fall below 50% of the minority workforce level. The FCC has proposed excusing stations from filing or maintaining detailed recruitment and hiring records as long as a station's overall employment profile is kept at certain levels relative to the percentage of minorities in the population.

- Do you support such a "benchmark" proposal, based on actual employment levels rather than recruitment efforts?

Yes ☐ No ☐ No Opinion ☐

- Would such a "benchmark" proposal significantly reduce EEO efforts?

Yes ☐ No ☐ No Opinion ☐

- If so, by how much?

- Should the "benchmark" be tied to a station's local workforce?

Yes ☐ No ☐ No Opinion ☐

- If not, how should the "workforce" be defined?

### Joint Recruitment Efforts

- The FCC currently requires each broadcast station with five or more employees to develop its own EEO program. Do you support a proposal that would give stations credit for using "central recruitment sources," such as state broadcast associations?

Yes ☐ No ☐ No Opinion ☐

- Would the use of "central recruitment sources" significantly reduce EEO efforts?

Yes ☐ No ☐ No Opinion ☐

- Does your station now offer internships or training programs?

Yes ☐ No ☐ No Opinion ☐

- If not, would the station do so if such efforts were credited by the FCC?

Yes ☐ No ☐ No Opinion ☐

## Alternative Labor Force

The FCC currently requires that stations use employment data from either the Metropolitan Statistical Area ("MSA") in which a station is located, or the county data for the community of license if the station is not located in an MSA.

"Alternative labor force" data is permitted only if (1) the distance of the station from areas with significant minority population is great; (2) commuting from those areas to the station is difficult; and (3) recruitment efforts in the MSA minority labor force have been fruitless.

- Does your station currently rely on MSA or county data to determine its EEO hiring requirements?

Yes ☐ No ☐

- Does this data accurately reflect the available labor force?

Yes ☐ No ☐ No Opinion ☐

- Do you support allowing a station to use alternative data if its contour does not cover significant minority areas of the relevant MSA or county?

Yes ☐ No ☐ No Opinion ☐

- If so, what is the most accurate indicator of a station's market: the station's principal community contour (70 dBu FM; 5 mV/m AM; Grade A TV) or the larger, primary service contour (60 dBu FM; 2 mV/m AM; Grade B TV)?

- Should a station be able to use alternative labor force data if it can show that "commuting from an area to the station is unlikely because of transportation difficulties or because the station's past recruitment efforts show that prospective employees are unwilling to commute from those areas"?

Yes ☐ No ☐ No Opinion ☐

- What do you think is the best means of determining the actual labor force available?



**HALEY BADER & POTTS P.L.C.**  
**EEO QUESTIONNAIRE**

Completed by: \_\_\_\_\_

Title: \_\_\_\_\_

Station: \_\_\_\_\_

Phone No.: \_\_\_\_\_

## **CERTIFICATE OF SERVICE**

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered\*, to the following:

Commissioner Reed E. Hunt \*  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

Commissioner James H. Quello \*  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Commissioner Rachelle B. Chong \*  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Commissioner Susan Ness \*  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

William E. Kennard, Esq. \*  
General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Room 614-B  
Washington, D.C. 20554

A handwritten signature in cursive script, reading "Barbara Reser", written in dark ink. The signature is fluid and stylized, with the first name "Barbara" and last name "Reser" clearly distinguishable.

July 10, 1996